

Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL
NO 02-99 OF 1990
ABDUL HAMID OMAR LP, MOHAMED YUSOFF AND
GUNN CHIT TUAN SCJJ
23 AUGUST 1990

Contract — Damages — Contract for quarrying works — Termination of contract — Whether time is of the essence of the contract — Delays in making payments under contracts — Whether respondent entitled to terminate contract — Whether stipulation in contract a condition or warranty — Express provision in contract for consequences of breach — Waiver — Whether respondent had intentionally foregone its claims — Estoppel not specifically pleaded — Remoteness of damage — Assessment of damages — Whether deductions should be made for tax — Contracts Act 1950, s 65

In this case the respondent had claimed damages for breach of contract for quarrying works. The respondent alleged that the appellant had failed to make payments due under the contract and had made wrongful deductions in payments made and they terminated the contract and claimed damages. The appellant denied the respondent's claims in the statement of claim but also raised two general defences. The first was the defence of waiver whilst the other general defence was that there was no stipulation in the agreement that time was to be of the essence of the contract and accordingly the respondent by terminating the agreement was in breach of it. The learned trial judge gave judgment for the respondent and the appellant appealed.

Held, allowing the appeal in part:

(1) Whether or not time is of the essence of a contract must depend on the facts and circumstances of each case. Intention of the parties gathered from the instrument itself together with the surrounding circumstances must be looked at. In this case, having perused the relevant contract and construed it as a whole, the court considered that time was of the essence of the said contract. Not only the provisions of the contract but also the nature of the contract, its subject-matter and the surrounding circumstances showed that payment and therefore time was of the essence.

(2) The respondent in this case was entitled to terminate the third extended contract because of the appellant's persistent delays in making payments to the respondent in accordance with the contract. There was therefore no wrongful repudiation of the contract for a breach of a stipulation, which the court considered was the intention of the parties by necessary implication to be regarded as a condition which goes to the root of the contract.

(3) Whether the stipulation was a condition or not did not matter in this case because the parties have expressly provided for the consequences of a breach thereof and the learned trial judge had given effect to the parties' intention.

(4) Section 64 of the Contracts Act 1950 represents a departure from the common law in England. It is open to a promisee to dispense with or remit wholly or in part the performance of the promise made to him or he can accept any promise which he thinks fit. Neither consideration nor an agreement will be necessary.

(5) In this case it had not been shown that the respondent had intentionally foregone its claims. The evidence showed that

A the respondent did not intend to abandon its claims under the various contracts and therefore the learned judge was correct in holding that as a matter of fact waiver did not apply in this case.

(6) Estoppel in any special form especially by conduct or by misrepresentation was not specifically pleaded in the statement of defence as the appellant should have done under O 18 r 8(1) of the Rules of the High Court 1980, because it was a material fact which would take the opposite party by surprise and raise issues of fact. In any case there was no evidence of any clear and unequivocal representation by the respondent in the correspondence or orally that it was abandoning its claim for damages. Nor was there evidence that the appellant had believed or relied on such representation and had acted to their damage upon such belief thus created. The learned trial judge had expressly found on the evidence that there was no such reliance. The appellants could not have relied on estoppel or any such issues not raised in the lower court and could not therefore raise them at the appellate stage.

(7) Although the prevailing and better practice is for the defendant to deal specifically with the claim for damages, yet there is no obligation on the appellants to plead to the allegations as to damages, because of the provisions of O 18 r 13(4). Therefore although remoteness of damage was not raised in cross-examination or during submissions before the trial court, it can be raised and argued at the appellate stage. In this case, on the evidence adduced as well as the findings of the learned trial judge, all the claims of the respondents should be allowed other than the alleged loss in respect of termination and retrenchment benefits paid to its employees and payments to the leasing company for repossession of the machines as they were too remote and have no nexus to the termination of the contract in question. The award of general damages of \$6,000,000 was also set aside as the award was wrong as the respondent was not the owner of the machines and were merely the lessees. They were entitled to the use and possession of those machines provided that the rent was paid. They could not claim for the loss of the value of those goods in respect of which they had no title.

(8) The question of deduction of income tax was not raised at all before the trial judge and there is no evidence adduced by either party as to the liability of the respondent to pay tax or the amount of its tax liability. In the circumstances of the case no further deductions would be made for tax.

(9) The decision of the High Court on liability against the appellants and its dismissal of the counterclaim are affirmed but the appeal against the question of damages is allowed to the extent indicated above.

[Bahasa Malaysia summary]

H Di dalam kes ini responden telah menuntut gantirugi kerana kemungkiran kontrak-kontrak pekerjaan gali batu. Responden mengatakan bahawa perayu telah gagal membuat pembayaran di bawah kontrak itu dan telah membuat potongan yang salah daripada pembayaran yang dibuat. Perayu menafikan tuntutan responden di dalam pernyataan tuntutannya dan juga menimbulkan dua pembelaan am. Yang pertama ialah pembelaan pelepasan manakala yang satu lagi ialah tidak ada syarat di dalam perjanjian itu bahawa masa menjadi asas kontrak dan oleh kerana itu apabila responden menamatkan kontrak itu, dia yang memungkirinya. Hakim yang arif telah memberi penghakiman bagi pihak responden dan perayu telah membuat rayuan.

Diputuskan, membenarkan sebahagian rayuan itu:

(1) Samada masa menjadi asas sesuatu kontrak mestilah bergantung kepada fakta-fakta dan keadaan tiap-tiap kes. Niat

pihak-pihak berkenaan diperolehi dari suratan itu sendiri bersama dengan keadaan sekeliling hendaklah dilihat. Di dalam kes ini selepas meneliti kontrak yang berkenaan dan mentafsirkan keseluruhannya, mahkamah berpendapat masa adalah menjadi asas kontrak itu. Bukan sahaja syarat-syarat kontrak itu akan tetapi jenis kontrak itu, perkaranya dan keadaan sekeliling menunjukkan bahawa pembayaran di bawahnya dan masa adalah asasnya.

(2) Responden di dalam kes ini berhak menamatkan kontrak lanjutan yang ketiga oleh kerana kelambatan yang berulang-ulang oleh perayu dalam membuat pembayaran kepada responden di bawah kontrak itu. Oleh kerana itu tidak terdapat penolakan yang salah bagi kontrak itu atas sebab mungkir perjanjian, yang mahkamah berpendapat adalah niat pihak-pihak secara implikasi kemestian hendaklah dianggap sebagai syarat yang menjadi akar-ubi kontrak itu.

(3) Samada perjanjian itu syarat atau waranti tidak sangat penting di dalam kes ini oleh kerana pihak-pihak telah memperuntukkan dengan nyata apa akibat kemungkinannya dan hakim yang arif telah memberi kesan kepada niat pihak-pihak itu.

(4) Seksyen 64 Akta Kontrak 1950 adalah berbeza dari 'common law' di England. Seorang penerima janji boleh tidak memerlukan atau melepaskan keseluruhannya atau sebahagian pelaksanaan perjanjian yang dibuat kepadanya atau dia boleh menerima apa-apa perjanjian lain yang dia fikir patut. Balasan atau persetujuan tidak diperlukan.

(5) Di dalam kes ini tidak dibuktikan bahawa responden telah sengaja melepaskan tuntutan. Keterangan di dalam kes itu menunjukkan bahawa responden tidak berniat meninggalkan tuntutan di bawah kontrak-kontrak itu dan oleh kerana itu hakim yang arif telah betul memutuskan bahawa sebenarnya pelepasan tidak wujud di dalam kes ini.

(6) Estoppel di dalam apa-apa jenis khas khususnya oleh kelakuan atau salahnya tidak diberi dalih dengan jelas di dalam pernyataan pembelaan perayu yang mana seharusnya dibuat di bawah A 18 k 8(1) Kaedah-Kaedah Mahkamah Tinggi 1980, oleh kerana ia adalah perkara penting yang boleh menyebabkan pihak lawan terperanjat kerana datang tiba-tiba dan juga menimbulkan isu fakta. Walaubagaimanapun tidak ada keterangan apa-apa gambaran yang nyata dan yang tidak meragukan di dalam surat-surat atau secara lisan bahawa dia telah tidak meragukan di dalam surat-surat atau secara lisan bahawa dia telah tidak meneruskan tuntutannya mendapat ganti rugi. Juga tidak ada keterangan yang menunjukkan bahawa perayu mempercayai atau bergantung kepada apa-apa representasi itu dan telah bertindak mengikut kepercayaan yang disebabkan-nya. Hakim yang arif telah memutuskan dengan nyata bahawa di dalam keterangan tidak ada pergantungan seperti itu. Perayu tidak boleh bergantung kepada estoppel atau isu seumpama itu yang tidak ditimbulkan di mahkamah bawahan dan dia oleh kerana itu tidak boleh membangkitkannya di peringkat rayuan.

(7) Sungguhpun mengikut amalan yang biasa dan lebih baik ialah defendan hendaklah memperkatakan dengan nyata tentang tuntutan ganti rugi, tidak ada keperluan ke atas perayu berdalih tentang perkara ganti rugi, oleh kerana terdapat peruntukan A 18 k 13(4). Oleh kerana itu sungguhpun kerosakan luar duga telah tidak dibangkitkan di dalam soalan balas atau di dalam hujah-hujah di hadapan mahkamah yang membicarakan kes itu, ia boleh timbul dan diujikan di peringkat rayuan. Di dalam kes ini, dari keterangan yang dikemukakan dan keputusan hakim yang arif semua tuntutan responden hendaklah

A dibenarkan selain dari kerugian yang dikatakan dari faedah penamatan dan pengurangan pekerja yang dibayar kepada pekerja-pekerjanya dan pembayaran kepada syarikat menyewa untuk mendapat balik jentera-jentera yang adalah luar dugaan dan tidak ada kaitan kepada penamatan kontrak itu. Award ganti rugi am \$6,000,000 juga diketepikan kerana award itu salah oleh kerana responden bukan pemunya jentera itu dan hanya penyewanya. Dia berhak menggunakan dan memiliki jentera itu dengan syarat sewa dibayar. Dia tidak boleh menuntut kehilangan harga barang itu yang mana mereka tidak mempunyai hakmilik.

B (8) Soal potongan cukai pendapatan tidak ditimbulkan sama sekali di hadapan hakim yang membicarakan kes itu dan tidak ada keterangan yang dikemukakan oleh mana-mana pihak mengenai tanggungan responden membayar cukai pendapatan itu atau jumlah tanggungannya itu. Di dalam keadaan kes ini tidak ada apa-apa potongan perlu dibuat untuk cukai.

C (9) Keputusan Mahkamah Tinggi mengenai tanggungan terhadap perayu dan penolakan tuntutan balasnya adalah disahkan akan tetapi rayuan terhadap jumlah ganti rugi dibenarkan setakat disebut diatas.]

D

Cases referred to

- 1 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (folld)
- 2 *Tan Ah Kian v Haji Hasnan* [1962] MLJ 400 (refd)
- 3 *Chin Kim & Anor v Loh Boon Siew* [1970] 1 MLJ 197 (refd)
- 4 *Panchaud Freres SA v Etablissement General Grain Co* [1970] 1 Lloyd's LR 53 (refd)
- 5 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (refd)
- 6 *Koufos v C Czarnikow* [1969] 1 AC 350 (refd)
- 7 *Daishowa (M) Wood Products Sdn Bhd v Kepong Wood Products Co Sdn Bhd* [1980] 2 MLJ 68 (folld)
- 8 *De Bussche v Alt* (1877) 8 Ch D 286 (refd)
- 9 *Procter and Gamble v Peter Cremer* [1988] 3 All ER 843 (refd)
- 10 *Societe Italo-Belge v Palm and Vegetable Oils (Malaysia) Sdn Bhd* [1982] 1 All ER 19 (refd)
- 11 *Wickman Machine Tools Sales v Schuler AG* [1974] AC 235 (refd)
- 12 *Sargent v ASL Development Ltd* (1974) 131 CLR 634 (refd)
- 13 *Habib Bank Ltd v Habib AG* [1981] 1 WLR 1265 (refd)
- 14 *Chuna Mal-Ram Nath v Mook Chand-Ram Bhagat* LR 55 IA 154 (refd)

G

Legislation referred to

Contracts Act 1950 ss 64, 74
Limitation Act 1953 (Rev 1981) s 4
Rules of the High Court 1980 O 18 r 8(1), r 13(4)

H Appeal from: Suit No C23-625-86 (High Court, Kuala Lumpur)

G Sri Ram (Chin Yew Meng and Khalid Mohamed with him) for the appellant.

RR Sethu (MS Murthi with him) for the respondent.

Cur Adv Vult

I

Gunn Chit Tuan SCJ (delivering the judgment of the court): The appellant, Associated Pan Malaysia Sdn Bhd, owner of a quarry as well as a cement manufacturing factory, appealed against the decision of Anuar J in the High Court at Kuala Lumpur on 9 March 1990, in favour of the respondent, Syarikat Teknikal and Kejuruteraan Sdn Bhd, a contractor for quarrying works.

The claim by the respondent was for damages for breach of contract. There were three agreements entered into between the appellant and the respondent. The first contract for the period from 3 September 1979 to 31 December 1980, was for quarrying works. The respondent was also to carry out operations of constructing haul roads from the quarry to the crushing plant.

For a period of six months after the expiration of the first contract there was no written agreement signed by the parties but the respondent carried on with the quarrying works on terms set out in the first contract.

The second contract was from 1 July 1981 to 30 June 1983, and the third contract was from 1 July 1983 to 30 June 1985. That third contract was extended for another year with effect from 1 July 1985 to 30 June 1986 (see letter dated 4 June 1985).

The appellant was dissatisfied with the decision of the learned judge and appealed against the whole of his decision on the grounds set out in the memorandum of appeal.

In order to appreciate the nature and extent of the claims it is useful to summarize them as follows:

- (1) Claims for the months of September, October and November 1980 (para 10 of the statement of claim)

The respondent alleged breach of promise by the appellant for failing or refusing to supply explosives for the blasting of rocks during those months. The particulars of loss are founded on the basis of minimum requirements by the appellant of 110,000 tonnes at an agreed price of \$410 per tonne and also on the basis of a margin of profit based at 32% of gross income making a total loss of \$379,551.16.

- (2) Claims for the months of March, April, May and June 1981 (para 12 of the statement of claim)

The respondent alleged that due to (a) breakdown of the appellant's rock blasting plant, (b) the appellant's delay in the completion of its new cement manufacturing plant, and (c) the appellant's failure to dewater the quarry, the respondent was prevented from loading the required minimum of 80,000 tonnes thereby incurring a loss of \$521,805.92. It should be observed that those three months are not covered by any written agreement.

- (3) Claim for period 1 January 1981 to 31 March 1982 (para 14 of the statement of claim)

A claim founded on the allegation that by reason of the appellant's neglect or refusal to dewater the quarry there was loss on account of (a) rental of machinery to replace the respondent's damaged machinery; (b) purchase of tyres to replace damaged tyres; and (c) purchase of spare parts for the respondent's machinery. It is also to be noted that under this head

A the period between 1 January 1981 to 30 June 1981 was not covered by any written agreement.

- (4) Claim for August 1984 to June 1985 — during the third contract (para 15 of the statement of claim)

B The respondent alleged that the appellant breached the agreement (a) in neglecting or refusing to dewater and (b) for failing to construct and maintain roads for the respondent's loaders and haulers. The respondent also alleged that during this period the appellant's crushing plant had frequent breakdowns.

C The third head of the claim may be divided into three categories of claim:

- (a) Claim for the period 1 November 1984 to 31 March 1985 (para 16 of the statement of claim) (letter of 2 November 1984). It was alleged that the appellant agreed to pay for a minimum of 7,000 tonnes of rocks per day for those months but due to reasons given in para 15 of the statement of claim the appellant had prevented the respondent from achieving the required tonnage and thereby incurred a loss in the form of shortfall the particulars of which were set out in para 16 of the statement of claim.

D (b) Claim for the months of April, May and June 1985 (para 17 of the statement of claim) (letter of 1 April 1985). This claim was again founded on the allegation that the appellant agreed to pay for a minimum of 200,000 tonnes of rocks for the three months but on grounds set out in para 15 of the statement of claim the appellant had prevented the plaintiff from achieving the required minimum whereby it suffered loss particulars of which were given in para 17 of the statement of claim.

F (c) Claim for the months of August 1984 to May 1985 (para 18 of the statement of claim). The respondent alleged that for reasons stated in para 15 of the statement of claim the respondent had suffered loss for the rental of machinery, the purchase of tyres and purchase of spare parts particulars of which are set out in para 18 of the statement of claim.

- G (5) Claim under para 22 of the statement of claim

H Under this head, the respondent alleged (a) under the terms of the third contract the payments were to be made by the tenth working day of each succeeding month (para 19 of the statement of claim) and (b) repeated written and verbal protests were made by the respondent. The respondent further alleged that the appellant breached the agreement by habitually and consistently delaying payments for the entire period from July 1983 to August 1985 and (c) on 28 August 1985 the respondent terminated the work under cl 19.2 of the third contract, which, inter alia, stated that each party may terminate the agree-

I

ment with four months notice in writing and cl 19.3 provides that any termination shall be without prejudice to any claim or action either party may have against the other in respect of any antecedents reached of the terms mentioned. The respondent alleged that arising from the appellant's breach of the third agreement he had suffered the following losses:

- (a) loss of profit for nine months unexpired period (presumably covered the period of the extension of the third contract) (particulars are set out in sch 'A' of the statement of claim);
 - (b) for the termination and retrenchment particulars are in sch 'B' of the statement of claim; and
 - (c) payments to the leasing company for repossession of the respondent's machinery (particulars in sch 'C' of the statement of claim).
- (6) Claim for the months of November 1984 to May 1985 (para 23 of the statement of claim)

A claim by the respondent that the appellant wrongfully deducted from payments due to the respondent a sum of \$123,733.77 as hiring charges for the appellant's track excavators used by the appellant.

- (7) Claim for the months of 2 August 1985 to 2 September 1985

This was a claim by the respondent that the appellant had wrongfully deducted from the respondent's invoices dated 2 August 1985 to 2 September 1985 the price for rocks hauled by the respondent for the sums of \$36,022.81 and \$320,547.63 respectively.

The respondent also claimed general damages for loss of machinery.

In its amended statement of defence and amended counterclaim the appellant not only denied the respondent's claims in paras 10, 12, 14, 16, 17, 18, 22, 23 and 24 of the respondent's statement of claim, but also pleaded two general defences. The first was the defence of waiver whilst the other general defence was that there was no stipulation in the last agreement that time was to be the essence of contract and accordingly the respondent by terminating the agreement was in breach of it.

After 24 days of trial during which the learned judge saw and heard the witnesses on both sides and having examined the voluminous documents running into over 3,000 pages of letters, reports, plans and invoices tendered, the learned judge found that the respondent had on the balance of probabilities established its claims in the said paragraphs of its statement of claim. He found that there was no evidence adduced by the appellant that it was induced to enter into further agreements by any representation, forbearance or inducement made by the respondent, and further considered that the defence of waiver

A was an afterthought to buttress an otherwise weak defence.

As regards the other general defence the learned judge was of the view that it was not open to the appellant to rely on it to defeat the contractual rights of the respondent under the agreement to terminate it for breach of contract.

B In the event he held that the notice of termination was valid and binding, and therefore allowed the respondent's claims against the appellant and awarded damages as prayed for in the statement of claim with interest and costs. He also dismissed the appellant's counterclaim with costs.

C Before us, it was the contention of Mr G Sri Ram, leading counsel for the appellant, that time was not of the essence of any of the contracts in question. He pointed out that the respondent terminated the contract dated 8 August 1983, as extended by a letter dated 28 August 1985 (vol 11 of the appeal records at p 3051) on the grounds D (a) that the appellant was in breach of the said extended contract in that payments had been made out of time; and (b) that the appellant had wrongfully deducted and withheld moneys due to the respondent.

E Counsel stated that in the court below the issues were (i) whether the respondent's termination of the said extended contract was justified or amounted to a wrongful repudiation and therefore a breach of contract; (ii) whether the appellant had been guilty of breaches of contract in respect of each of the periods concerned; and (iii) if the appellant was in breach of contract as aforesaid then, F whether such breach or breaches had been waived by the respondent as pleaded in para 22 of the amended defence (vol 1 of the appeal records at p 38). Counsel stated that the above issues also arise in the appeal before us. There is an additional issue that arises in this appeal in respect of quantum, that is, whether the formula adopted and applied by the learned judge in assessing damages and the G quantum awarded by him are under admissible heads and whether the same is reasonable having regard to the remoteness and measure of such damages and the tax element.

H It was submitted for the appellant that the grounds relied upon by the respondent for terminating the said extended contract were without substance because, in respect of late payments, time was not and had not been made of the essence, and in respect of the deductions they were entirely proper. He stated that it was not open for the respondent to contend that the appellant had thrown out I the contract because there was no refusal on the part of the appellant to continue performance. Further there was nothing in the appellant's conduct to suggest that it no longer intended to be bound by the contract. He contended that the respondent was therefore not entitled to bring the contract to an end by terminating it. The purported termination was accordingly without lawful justi-

fication and constituted a wrongful repudiation. Counsel also contended that if there had been any breaches by the appellant they were all waived by the respondent. Counsel claimed that by reason of all the circumstances of the case and upon a proper application of the relevant law to those circumstances the respondent was not entitled to any relief whilst the appellant was entitled to judgment on its counterclaim. Counsel also contended that if the appellant is liable then the quantum awarded by the learned judge is excessive and unreasonable and suffers from errors in points of principle.

Counsel suggested that there are two approaches to determine the rights of an 'innocent' party where a breach of contract is either admitted or found to exist. The first approach is to ascertain the importance of the broken stipulation. Thus if the term in question is, when objectively viewed, an important one (called a condition or fundamental term) its breach would give the 'innocent' party the right to put an end to the whole contract and to sue for damages for its breach. But if the term is, when objectively viewed, one that is relatively unimportant (called a warranty) then its breach would give rise only to an action in damages. Counsel then referred to the following passages in the judgment of Sellers LJ and Upjohn LJ respectively in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*¹ at pp 60, 63-64:

The formula for deciding whether a stipulation is a condition or a warranty is well recognized, the difficulty is in its application. It is put in a practical way by Bowen LJ in *Bentsen v Taylor, Sons & Co* ([1893] 2 QB 274, 281; 9 TLR 552): 'There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.' ...

It is open to the parties to a contract to make it clear either expressly or by necessary implication that a particular stipulation is to be regarded as a condition which goes to the root of the contract, so that it is clear that the parties contemplate that any breach of it entitles the other party at once to treat the contract as at an end. That matter has to be determined as a question of the proper interpretation of the contract. Bramwell B in *Tarrabochia v Hickie* [1 H&N 183, 188] has warned against the dangers of too ready an implication of such a condition. He said: 'No doubt it is competent for the parties, if they think fit, to declare in express terms that any matter shall be a condition precedent, but when they have not so expressed themselves, it is necessary for those who construe the instrument to see whether they intended to do it. Since, however, they could have done it, those who construe the instrument should be chary in doing for them that which they might, but have not done for themselves.' Where, however, upon the true construction of the contract, the parties have not made a particular stipulation a condition, it would in my judgment be unsound and misleading to conclude that, being a warranty, damages is necessarily a sufficient remedy.

- A The second approach, according to Mr Sri Ram is to examine the consequences of the alleged breach. Thus if the breach in question is so serious as to go to the root of the contract, then repudiation and damages may be exercised and claimed. But if the breach is minor and thus not affect the sub-stratum of the contract then the right exercisable is a claim sounding in damages with no right of repudiation. Counsel stated further that if the guilty party is in breach of contract, the innocent party may elect either to accept the breach, treat the contract as at an end if the term broken is a condition and forthwith sue for damages. On the other hand he may acquiesce in the breach and treat the contract as continuing. If he elects to take this course of action, the innocent party is then barred from pursuing any remedy. The extinguishment of the right to sue may be grounded on affirmation, acquiescence, waiver or estoppel. Counsel contended that it matters not which of these expressions is used for they are all species of a common genus, namely, the doctrine of estoppel.

- Counsel then contended that the learned judge should have considered whether the respondent was justified in terminating the extended third contract. He pointed out that the letter of termination (vol 11 of the appeal records at p 3051) gave two reasons. As regards the first reason, namely, late payments, he stated that the respondent's case was that ab initio, the time clause was honoured more by breach than observance. He then referred to the learned judge's conclusion on the issue as to whether the termination was justified and submitted that the conclusion of the learned judge was wrong because the statement of law that time not being of the essence will not defeat a claim for damages for breach of contract is not correct and contrary to authority. He contended that time to be of the essence is not only germane to a party seeking the remedy of specific performance only as stated by the learned judge, and also that for time to be of the essence notice must be given; otherwise there would be no breach. He contended that to terminate the contract in the circumstances of this case was wrongful repudiation. Counsel then referred to *Tan Ah Kian v Hj Hasnan*² (at p 402) which was a case concerning a sub-contract for work and materials to lay roads and stated that the courts in this country do not treat time to be of the essence in this type of cases. It was therefore his contention that since time was not of the essence in this case it is not a condition, the breach of which would entitle the innocent party to repudiate.

- Counsel also contended that the contemporaneous documentary evidence and the conduct of the parties towards each other during the tenure of their relationship vis-a-vis the time stipulation supports the conclusion that the parties did not consider it to be an important term. In any event he contended that the evidence showed that the respondent had affirmed or acquiesced in the making of late payments and can no longer rely upon it as a cause to ground termination.

As regards the second reason given, namely, wrongful deductions, counsel pointed out that it was in respect of two periods, namely, (a) October 1984-May 1985, ie during the subsistence of the third contract and (b) August 1985-September 1985, ie during the extension of the third contract. Counsel stated that the evidence, both oral and documentary, shows that the appellant made advance payments and supplied goods and machinery to the respondent at his request. The charges in respect of such supplies were consequently deductions which the appellant was entitled to make. It was contended that the totality of the evidence supports a conclusion of waiver or acquiescence on the respondent's part which therefore did not afford justification for termination of contract.

On the issue as to whether the termination of contract was justified, counsel concluded by submitting that the learned judge had failed to test the respondent's evidence against the totality of the contemporaneous documents. He contended that the failure constituted a serious misdirection which had occasioned a miscarriage of justice. Moreover a consideration of the whole of the evidence showed that the respondent had waived his rights by electing to affirm each alleged breach and there was therefore no lawful justification for the termination of contract.

On the other issues raised, Mr Sri Ram contended that it was not open to the respondent to make any claim in respect of matters in the past by reason of waiver, election or acquiescence. He referred to the relevant passages in the learned judge's judgment and contended that the learned judge had misdirected himself on the issue of waiver. He stated that the learned judge was looking for a dispensation of a promise by the promisee, and contended that that was not the context in which the term 'waiver' is applicable or is to be used in this case. Counsel stated that the 'waiver' applicable here is in the sense that any wrong by way of a failure to perform has been affirmed by conduct so that the respondent is estopped from contending that there has been a breach of an obligation. He pointed out that in English law waiver requires an agreement and consideration; but our law does not because it is governed by s 64 of the Contracts Act 1950. He then referred to *Chin Kim & Anor v Loh Boon Siew*³ at p 198 in which case reference was made to s 40 of our Contracts Act 1950 concerning the effect of refusal of a party to perform a promise wholly and where the former Federal Court had explained the meaning of the expression 'unless he has signified by words or conduct his acquiescence in its continuance' appearing therein. He also referred to a passage in the judgment of Winn LJ in the UK Court of Appeal case of *Panchaud Freres SA v Etablissements General Grain Co*⁴ at p 60:

There is a very good discussion of waiver in *Chitty on Contracts* (23rd Ed), General Principles vol 1, at para 1241 and the following paragraphs. I do not take time to quote from

those paragraphs; it is quite clear on referring to them that the learned authors treat, and I think rightly treat, 'waiver' as derived either from agreement or from a quasi-estoppel. In my own judgment it does not seem possible in this case to say affirmatively that there was here either a fresh agreement, to rescind or vary the original contract, or anything which, within the scope of the doctrine as hitherto enunciated, could be described as an estoppel or a quasi-estoppel. I respectfully agree with my Lord that what one has here is something perhaps in our law not yet wholly developed as a separate doctrine — which is more in the nature of a requirement of fair conduct — a criterion of what is fair conduct between the parties. There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negating any liberty to blow hot and cold in commercial conduct.

Mr Sri Ram therefore contended that in the context of the long relationship between the parties it was a fair inference that the respondent had given up its rights to terminate the contract on the grounds stated and submitted that the respondent was not entitled to blow hot and cold in its conduct. He contended that the principle of law stated by the learned judge constituted a misdirection on the law applicable to the subject at hand which entitled the appellant to have the judgment set aside.

On the question of damages, Mr Sri Ram submitted that assuming that the respondent was justified in terminating the extended contract, then ensuing damage cannot encompass previous losses. Moreover the losses de futuro cannot in this case comprise damage falling outside the provisions of s 74 of the Contracts Act 1950, because the damage is too remote and irrecoverable.

He also contended that the awards of alleged losses in the past and loss in respect of termination and retrenchment payments and benefits paid to employees and also payment to the leasing company for repossession of machines were wrong in principle.

It was also contended that the measure of damages for loss of profits is also excessive by reason of the respondent's own evidence of the lack of it. Counsel pointed out that for the two years for which accounts were produced, ie 1979 and 1980, losses were shown. He also pointed out that the respondent did not produce audited accounts for the relevant years nor were tax returns produced. Counsel contended that if the learned judge was right in awarding damages at all, then he ought to have provided for the incidence of tax.

On the award for loss of machinery (para 22(iii) of the statement of claim) counsel stated that the learned judge awarded \$7,968,452.80. The respondent had also claimed general damages for loss of the machines and the learned judge awarded \$6,000,000 under that head. Counsel submitted both awards were inadmissible. As regards the award of \$7,968,452.80, Mr Sri Ram stated that the learned judge was wrong in his finding that there was no serious challenge. He stated that there was in fact a serious

challenge on that issue, and pointed out that the respondent had had use, enjoyment and possession of those machines prior to 20 October 1982, when the lease was with Borneo Tractors. Counsel contended that on the evidence it was fair inference that it was the respondent's inability to pay under the leases that led to the repossession of the machinery and it had therefore no nexus with the grounds for termination. Moreover it was an error in principle in point of remoteness to make any award under those circumstances.

As regards the award of \$6,000,000 counsel contended that that head of damage was wholly inadmissible and the learned judge ought not to have countenanced it. He pointed out that the respondent was not the owner of the machines. It was merely the lessee and was entitled to the use and possession of the machines provided that rent was paid. Since it had no ownership rights it could not claim for the loss of the value of goods in respect of which it had no title to. By reason of the foregoing counsel submitted that the award of \$13,968,452.80 should be set aside.

Mr Sri Ram also contended that the learned judge was wrong in making an award of \$1,155,865 as claimed by the respondent in para 14 of his statement of claim for losses alleged to have been suffered by the respondent due to the appellant's neglect or refusal to dewater the quarry throughout the period 1 January 1981 to 31 March 1982. He also stated that the learned judge was wrong in making the award of \$1,705,106.04 as claimed by the respondent in para 18 of its statement of claim for the period from August 1984 until June 1985 because of the appellant's breach of their agreement for having neglected or refused to dewater the quarry and to construct and maintain roads for the respondent's loaders and haulers. Counsel stated that the evidence did not warrant the making of such awards because part of the claims relate to replacement of materials damaged by ordinary wear and tear for which the appellant could not be held liable. Moreover there was no intimation of such claims at the material time so that the appellant was entitled to assume that there were no such claims or that they had been abandoned. For remoteness of damage reliance was placed on s 74 of the Contracts Act 1950 and on *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*,⁷ *Koufos v C Czarnikow Ltd*⁸ and on the incidence of taxation counsel referred to *Daishowa (M) Wood Products Sdn Bhd v Kepong Wood Products Co Sdn Bhd*.⁷

On the question of liability, Mr RR Sethu, leading counsel for respondent, submitted that whether the respondent was entitled to terminate the contract for the breach in question, ie the late payments, is a question of construction of the relevant document. He submitted that the respondent was entitled to do so in this case because the late payments were not only established by evidence

A but also freely admitted by the appellant. Counsel also referred to the *Hongkong Fir Shipping* case¹ and pointed out that in that case the parties had not specifically provided for termination and there was no termination clause in the charterparty involved in that case. He stated that cl 19.2 of the contract in this case (vol 3 of the appeal records at p 376) has expressly provided that the respondent can terminate for breach of 'any term' of the contract and that included cl 7.1 (vol 3 of the appeal records at p 371) which provides that 'payments will be made to the contractor before the tenth working day of the following month'. Counsel therefore contended that it is irrelevant to consider the question whether the term for payment is a condition or a warranty because the parties have expressly provided for the consequence and that was the expression of their intention to which the learned judge had rightly given effect.

D Counsel also submitted that time was of the essence in this case because of cl 19 and also the nature of the contract the surrounding circumstances of which indicate that time for payment was of the essence because of two relevant factors, namely, (i) the term for payment was reduced from 15 days in the first contract to 10 days in the subsequent contracts; (ii) the respondent was dependent on those payments to pay his creditors and his workers who have to be paid by the seventh day of the month. Mr Sethu distinguished *Tan Ah Kian's* case² and pointed out that there was no provision in the contract in that case for termination for any breach thereof. He also pointed out that in any case our courts apply the same principles of law as in the United Kingdom and that a contract for work and labour does not stand on a different footing and that the evidence of surrounding circumstances could show that time was of the essence.

G Mr Sethu then pointed out that neither laches nor acquiescence was pleaded or argued before the learned judge in the High Court. He referred to s 4 of the Limitation Act 1953 and pointed out that any defence under that Act cannot be considered unless pleaded. On waiver, counsel pointed out that in the court below the appellant in its submission did not suggest in what sense it was using the term and in what sense it wanted the judge to find on waiver. He submitted that the judge considered waiver in the narrow sense and in the legal sense including estoppel. Mr Sethu stated that waiver was not applicable in this case and contended that every time a breach of contract occurred there is a vested right of action which could only be satisfied by accord and satisfaction and referred to the following passage in the judgment of the UK Court of Appeal in *De Bussche v Alt*⁸ at p 314:

I But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal consideration. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord

and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings for the promise would be without consideration, and therefore not binding.

Counsel contended that silence did not constitute waiver and pointed out that in each contract there was no mention of past liability. He also invited the court to look at cl 19.3 of the contract (vol 3 of the appeal records at p 372) which provided that 'any termination or prior determination of this agreement shall be without prejudice to any claim or action either party may have against the other in respect of any antecedent breach of the terms mentioned herein'. Mr Sethu also stated that waiver requires an intention to forego a claim and the learned judge had accepted the evidence of Mr Ong (PW1), the chief executive of the respondent, that it had not intended to abandon its claims. Counsel also stated that even if a contract had expired, nevertheless the right to claim damages was not lost, and submitted that waiver is essentially a question of fact and referred to *Procter and Gamble v Peter Cremer*⁹ at p 853.

Mr Sethu then pointed out that the other meaning of waiver is estoppel. He submitted that there was no plea in the defence based on the exchange of correspondence nor was it raised in the court below either in the submission or cross-examination of the respondent's witnesses. Counsel submitted that an estoppel requires an unequivocal and unambiguous representation that the respondent was abandoning or would forebear to make any claims, and pointed out that there was no such representation in any of the letters relied on by the appellant and there was no mention that the respondent was abandoning its claims for damages. Moreover there was no evidence of any reliance or detriment which are essential for estoppel as pointed out Robert Goff J in *Societe Italo-Belge v Palm and Vegetable Oils (Malaysia) Sdn Bhd*¹⁰ (at pp 25-26) and the learned judge had expressly found that there was no such reliance.

Counsel then pointed out that the appellant did not submit on election before the trial judge and contended that it was not open to the appellant to raise it now before this court. He submitted that a breach of contract entitles the innocent party either to terminate it and claim damages or to affirm the contract and claim damages; either way the right to damages is not affected. Affirmation only deprives the remedy of termination, and the right to damages for a breach of contract is a common law remedy unaffected by any equitable considerations. He submitted that in any case cl 19.3 of the contract (vol 3 of the

A appeal records at p 377) expressly preserves the right to claim damages.

B On wrongful deductions Mr Sethu stated that the respondent's challenge relates to the propriety of the deductions. The respondent alleged that deductions had been made for machines he did not use and there were deductions made for machines used by the appellant for its own purposes and the charges are exorbitant.

C On the issue of remoteness of damage, Mr Murthi, the other counsel for the respondent, pointed out that the appellant did not either in its pleadings, cross-examination or submission raise the question of remoteness. Thus on the question of loss of profits there was no evidence in rebuttal. He pointed out that documents in this case were filed one year before trial and no particulars and proper discovery were sought before it. On the evidence in rebuttal by the appellant Mr Murthi pointed out that there was no other evidence except that of the assistant Registrar of Companies (DW3) who stated that from 1982 onwards no accounts have been filed by the respondent. He then referred to the relevant passages in the grounds of judgment and pointed out that the learned judge had gone through the respondent's claims one by one. He also pointed out that the learned judge had addressed his mind on the remoteness of certain claims and had rejected some of them as being too remote. Counsel then stated that the stand of the appellant in the court below was that the respondent was either entitled to all its claims or to nothing at all. It never challenged any particular claim. He referred the court to the pleadings and stated that new points have now been taken in the Supreme Court and contended that the question of remoteness of damage does not therefore arise.

G On the complaint of the appellant that there was lack of proof especially for the loss of profits, counsel drew attention to the point made by the learned judge that there was no question of audited accounts being required for the period when the respondent was not operating the business anymore. Counsel pointed out that Mr Ong had given evidence for the respondent that loss of profits was a percentage of the contract sum and sufficiency of the proof of damage was a matter for the trial judge. The appellant in the court below did not dispute the respondent's mode of assessment of loss of profits. He contended that in the absence of any challenge the learned judge had rightly accepted and acted on the evidence of the respondent.

I On the question of deduction of income tax, it was the respondent's submission that the appellant having failed to raise that plea before the trial judge, it could not now be permitted to raise it for the first time in this court. He contended that it would involve evidence as to whether the respondent would be under a liability to pay tax.

In his reply, Mr Sri Ram reiterated that notice was not given to make time of the essence. He submitted that an intention to make time of the essence of the contract must be expressed in unmistakable language or may be inferred from what passed between the parties before but not after the contract was made. In support of that contention, he referred to the following passage in the judgment of Lord Wilberforce in *Wickman Machine Tools Sales v Schuler AG*¹¹ at p 261:

In my opinion, subsequent actions ought not to have been taken into account. The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive. As to statements during negotiations this House has affirmed the rule of exclusion in *Prenn v Simmonds* [1971] 1 WLR 1381 as to subsequent actions (unless evidencing a new agreement or as the basis of an estoppel) in *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583.

Counsel also contended that the law makes no distinction as to the rights of parties whether there is an express right of termination or not and relied on the Australian case of *Sargent v ASL Developments Ltd*¹² at p 655.

On waiver Mr Sri Ram's reply was that it has been expressly pleaded in the statement of defence. He contended that the expression used is not material and that it may be called acquiescence, laches, waiver, affirmation or estoppel and that they are all species of a common genus. He stated that he relied heavily on *Habib Bank Ltd v Habib AG*¹³ at pp 1283-1285.

Counsel pointed out that the respondent had asked for successive contracts and contended that it was reasonable for the appellant to infer that the respondent had waived its rights. He then contended that English common law in the cases quoted by the respondent is materially different from our law which is found in s 64 of the Contracts Act 1950. He then referred to *Chuna Mal-Ram Nath v Mool Chand-Ram Bhagar*¹⁴ which was a decision under s 63 of the Indian Contracts Act 1872 (similar to s 64 of our Contracts Act 1950) in which the Privy Council held that a promisee can effectually dispense with performance of a contract, in whole or in part without either an agreement by the promisor, or consideration for the dispensation.

Mr Sri Ram also submitted that as the learned judge had misdirected himself on the law of waiver, it was necessary to point out the difference between waiver at common law in the sense quoted by the learned judge from *Chitty on Contracts* and waiver in the identical sense under our law, that is, s 64 of the Contracts Act 1950.

A Counsel also submitted that what has to be borne in the forefront of one's mind is that any given stipulation in a contract or a breach of any stipulation may be waived by either party in the sense advanced by the appellant.

B In answer to the contention of the respondent that the taxation point was not raised before the High Court, it was the contention of Mr Sri Ram that taxation is a necessary incidence in the assessment of damages which every court undertaking such a task is by law enjoined to take into account. He pointed out that in *Daishowa's* case⁷ the trial court did not take tax into account but that did not prevent the Federal Court from dealing with an essential ingredient.

C Whether or not time is of the essence of a contract must depend on the facts and circumstances of each case. Intention of the parties gathered from the instrument itself together with the surrounding circumstances must be looked at. In this case having perused the relevant contract and construed it as a whole and cll 7.1 and 19.2 therein in particular, we considered that time was of the essence of the said contract. We agreed with Mr Sethu that not only the said provisions of the contract but also the nature of the contract, its subject matter and the surrounding circumstances showed that payment and therefore time was of the essence. The respondent in this case was entitled to terminate the extended third contract because of the appellant's persistent delays in making payments to the respondent in accordance with cl 7.1 of the said contract. There was therefore no wrongful repudiation of the said contract for breach of a stipulation which, applying the tests suggested by Sellers LJ and Upjohn LJ in the *Hongkong Fir Shipping* case,¹ we considered was the intention of the parties by necessary implication to be regarded as a condition which goes to the root of the contract. In any case we also agreed with Mr Sethu that whether the stipulation concerned was a condition or not did not matter because the parties have expressly provided for the consequences of a breach thereof and the learned judge had given effect to the parties' intention.

G The word 'waiver' is used in the English common law in a variety of different senses. As pointed out by the respondent, it was unfortunate that the appellant, as the defendant, had not submitted to the trial judge in what sense the word was pleaded and used. But we agreed with Mr Sri Ram that s 64 of our Contracts Act 1950, which was also not brought to the attention of the learned judge, represents a departure from the common law in England. Our law on waiver in s 64 of the Contracts Act 1950, is similar to the Indian law on the general principles of waiver under which it is open to a promisee to dispense with or remit wholly or in part the performance of the promise made to him or he can accept any promise which he thinks fit. Under our law neither consideration nor an

agreement will be necessary. But in this case we also agreed with the respondent that it had not been shown to the trial judge or to us that the respondent had intentionally foregone its claims. On the other hand the learned judge who saw and heard Mr Ong in the witness box accepted his evidence that the respondent did not intend to abandon its claims under the various contracts. We therefore agreed with the learned judge that as a matter of fact waiver did not apply in this case.

Estoppel in any special form especially by conduct or by representation was not specifically pleaded in the statement of defence as the appellant should have done so under O 18 r 8(1) of the Rules of the High Court 1980, because it is a material fact which would take the opposite party by surprise and raise issues of fact. As a result it was not raised in the court below either in other submissions by counsel or cross-examination of the respondent's witnesses. In any case there was no evidence of any clear and unequivocal representation by the respondent in the correspondence or orally that it was abandoning its claims for damages. Nor was there evidence that the appellant had believed and relied on such representation and had acted to his damage upon such belief thus created. The learned judge had also expressly found on the evidence that there was no such reliance. The appellant could not have relied on estoppel or any such issues not raised in the lower court and could not now therefore raise them at the appellate stage.

Although the appellant did not raise as a positive allegation the question of remoteness of damage in respect of all or some of the respondent's claims, yet it has pleaded in para 23 of the statement of defence that 'save and except as herein admitted, the defendant denies each and every allegation in the statement of claim as if traversed seriatim.' Although the prevailing and better practice is for the defendant to deal specifically with the claim for damages, yet there is no obligation on the appellant, as defendant, to plead to the allegations as to damages, because by O 18 r 13(4) 'any allegation that a party has suffered damage and any allegations as to the amount of damages is deemed to be traversed unless specifically admitted'.

Therefore although remoteness of damage was not raised in cross-examination or during submissions before the trial court, we considered that it can be raised and argued before us for our consideration whether all or some of the respondent's claims for damage were too remote. We must of course bear in mind that the respondent had no opportunity to lead evidence in rebuttal and also, as pointed out by Mr Murthi, that the appellant never sought for any particulars or discovery. But we have, like the learned judge, gone through the various claims of the respondent against the appellant in its statement of claim, and consider that on the evidence adduced as well as the learned judge's findings they should all be allowed except those stated in sub-paras (viii) and (ix) of

A para 25A therein because the alleged loss of \$301,682.53 in respect of termination and retrenchment payment and benefits paid to employees and the payments of \$7,968,452.80 to the leasing company for repossession of the machines were too remote and have no nexus to the termination of the contract in question. Those two awards were wrongly made. The special damages awarded are therefore reduced to \$7,882,210.14. As for the award of general damages of \$6,000,000, we also agreed with the appellant that the award was wrong as the respondent was not the owner of the machines and was merely the lessee. It was entitled to the use and possession of those machines provided that rent was paid. We also agreed that as the respondent was not the owner of those machines it could not claim for the loss of the value of those goods in respect of which it had no title. That award of \$6,000 is also therefore set aside.

D As regards the tax element it is impossible to assess the reduction to be made for taxation without any or sufficient evidence. Had there been a deduction for tax the amount awarded would of course be less, and following *Daishowa's* case⁷ the amount of damages awarded would have been reduced further. However, as pointed out by Mr Murthi, the question of deduction of income tax was not raised at all before the trial judge and there is no evidence adduced by either party as to the liability of the respondent to pay tax or the amount of its tax liability. In the circumstances of this case we would therefore decline to make any further deductions for tax.

F The decision of the High Court on liability against the appellant and its dismissal of the counterclaim are affirmed but the appeal against the quantum of damages is allowed to the extent indicated above. The respondent is still entitled to interest as ordered by the High Court on the amount of damages as reduced as from the date of notice of termination of contract, that is, on 28 August 1985. As for costs, the appellant shall pay half of the respondent's costs here and in the court below.

G *Order accordingly.*

Solicitors: *Allen & Gledhill; Murthi & Partners.*

H Reported by *Prof Ahmad Ibrahim*

I